Court, U.S.
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No. 09-643

In the

Supreme Court of the United States

CARL H. BROWN,
Petitioner,

v.

MARRIOTT INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a conflict among the Federal Circuits in their analysis of pretext in discrimination charges?

2. Did the Fourth Circuit require a showing of pretext greater and more onerous than that required under *Burdine*? *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

3. Did the Fourth Circuit fail to consider evidence regarding Brown's claim that the proffered legitimate, nondiscriminatory reasons were pretext?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Marriott International, Inc., a Delaware corporation, is a wholly-owned, publicly traded company. No publicly owned company owns 10% or more of the membership interests of Marriott International, Inc.

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STATEMENT

Carl H. Brown originally filed a Complaint in the Circuit Court for Montgomery County, Maryland against Marriott International, Inc. ("Marriott") alleging violation of Title VII, 42 U.S.C. §2000e and the Montgomery County Human Rights Act, Maryland Code Article 49B, §42. Marriott removed the case to the United States District Court for the District of Maryland.

Subsequent to the removal, Marriott filed a Motion for Summary Judgment seeking dismissal of all counts. The Honorable Alexander Williams, Jr. granted Marriott's Motion for Summary Judgment on October 31, 2008. Pet. App.[1] at 5. Brown filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on November 25, 2008. In an unpublished opinion, dated August 3, 2009, the Fourth Circuit Affirmed. Pet. App. at 1.

This matter arises out of Brown's application for the position of Production Support Manager at Marriott. After receiving his resume, the Staffing Manager contacted Brown to schedule a telephone interview with the Hiring Manager. MSJ[2] at 5. On March 24, 2005, Brown had a telephone interview with Judith Fried, the Hiring Manager. *Id.* Even though the Hiring Manager never met Brown in-person, he claims that he was discriminated against because he is African-American.

There are multiple factual inaccuracies throughout Brown's Petition for Writ of Certiorari.

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[1] "Pet. App." refers to the Appendix to Brown's Petition for Writ of Certiorari.

[2] "MSJ" refers to the Motion for Summary Judgment Marriot filed on March 20, 2008 in the United States District Court for the District of Maryland.

The factual background as found by the District Court and upheld by the Fourth Circuit is as follows:

Judith Fried, the Hiring Manager for the position at issued, is the Director of Information Resources at Marriott. After she became Director, she determined that there was a need for another manager position. *Id.* Fried prepared an Assignment Statement detailing the responsibilities of the new position of Production Support Manager. *Id.*

On or about March 8, 2005, Marriott advertised an open job position in the Washington Post for a "COBOL Production Support Manager." *Id.* at 5. Brenda Mitchell, from the Human Resources Department, prepared the external job posting in the Washington Post and selected the title "COBOL Production Support Manager" in an effort to maximize the number of candidates who would apply for the position. *Id.* Fried, the Hiring Manager, was not involved in drafting the external job posting. *Id.*

On or about March 15, 2005, Brown submitted his resume to Marriott for the position of COBOL Production Support Manager. *Id.* After Brown submitted his resume, Mitchell contacted him to schedule him for a telephone interview with Fried. *Id.*

On or about March 24, 2005, Fried conducted a telephone interview of Brown. *Id.* Brown claims that, during the telephone interview, he told Fried that he started a minority-owned business. Brief[3] at 2. Based on this information, Brown speculates that

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[3] "Brief" refers to the Brief of Appellee that Marriott filed on April 7, 2009 in the United States Court of Appeals for the Fourth Circuit.

Fried knew that he is African-American, even though he did not meet Fried in person or tell her that he is African-American. *Id.* Brown was not invited for an in-person interview and was not offered the position. *Id.* at 3. Brown claims that he was not hired for the position because he is African-American. *Id.*

Contrary to Brown's assertions, there is no evidence that Fried misinformed Brown about the position. *Id.* at 7. In fact, Brown admitted that he did not know the requirements for the position. *Id.* Brown admits that he went into the telephone screening with Fried thinking that the requirements of the job were for him "to manage the system and support the system." *Id.* at 18. It was during the course of his telephone screen with Fried that she advised him that "the job was not fixing the problem." *Id.* Brown saw this as more of a technical position than a management position. *Id.* When asked what he understood Fried's comment to mean, he replied, "I don't know, there might have been some other problems that I had to fix, it might have been some other technical things she might have wanted me to do. I don't know what the job is." *Id.* at 18-19.

After Fried decided that his application would not go any further, Brown communicated with Mitchell regarding the position. Mitchell ultimately recommended to Fried that they give Brown another opportunity. *Id.* at 20. Even though Fried, the Hiring Manager, had initially decided not to hire Brown, at Mitchell's prompting, she agreed that Mitchell should give Brown another opportunity. *Id.* Brown's candidacy for the Production Support Manager position was still viable at this time. *Id.*

Mitchell contacted Brown for a telephone interview. MSJ at 16. During the telephone interview Mitchell asked Brown questions designed to solicit information regarding projects he had completed, projects he had managed, the number of individuals on the teams he had managed, the extent of his management experience, and customer interfacing. *Id.* Mitchell found that Brown did not clearly answer questions he was asked, that his responses were not very logical, and that he seemed to talk around things. Mitchell recommended no further action regarding Brown's application. *Id.*

Brown testified he saw no purpose in his telephone interview with Mitchell. *Id.* He did not think that the telephone interview with Mitchell was significant. *Id.* "[M]y mind set was that it didn't serve a real purpose...So I wasn't geared up to discussing my background or my experiences or anything of that sort." *Id.* The telephone interview with Mitchell was Brown's second chance to be considered for the position of Production Support Manager; however, he admits that he did not treat it as significant or important. *Id.* at 16-17. Brown's performance during his telephone screening with Fried risked his opportunity for the position, as well as, other positions at Marriott. *Id.* at 17. Mitchell reached similar conclusions to Fried and recommended no further action as to his application. *Id.*

Marriott's decision not to hire Brown for the position was further supported by the next communication Brown sent Mitchell. *Id.* After Mitchell's telephone interview of Brown on April 7, 2005, he sent her an email on April 19, 2005. *Id.* His email stated, in part, "Brenda, I like most

candidates, am just interested in a fair opportunity to compete for positions. My **pursue** [sic] of a career with Marriott is because of its great reputation. I hope my continuing **pursue** [sic] of this position is not causing any **undo** [sic] problems." *Id.* After performing poorly in two telephone interviews, Brown sent an email riddled with grammatical and spelling errors, further demonstrating that he did not possess the communication skills necessary for the manager position. *Id.* Brown claims that Mitchell indicated in her notes that Brown was a "good fit w/ our pos. Our priorities all his career. (Judy)." Brief at fn. 2. Those notations were made by Mitchell to capture what Brown had said to her, and did not reflect what she thought of Brown. *Id.* The District Court's determination that the reason for Marriott's refusal to hire Brown was deficiencies in his language and communication skills was based on the uncontroverted evidence in the case.

On or about May 5, 2005, the position was put on hold and a temporary contract employee, Richard Miller, was staffed for the position. *Id.* at 5. Although Marriott did not hire Miller on a permanent basis, Brown's assertion in his petition that he lacked the qualifications for the position is unsupported by the record. *Id.* at 23. There is no evidence that the temporary employee had any shortcomings. *Id.* In fact, Fried, who interviewed the temporary contract employee, stated that he had a good resume, a good background, and had worked for good companies. *Id.* Her only hesitation in hiring him on a permanent basis was a few personality characteristics that made her think that he might not be right for the position. *Id.* at 23-24.

On December 5, 2005, an applicant, Gaetan Bedard, was hired for the position on a permanent basis. *Id.* at 5. Brown asserts a baseless allegation that Marriott instructed a white candidate to falsify his resume. *Id.* at 21. This is not supported by any evidence. *Id.* First, no one from Marriott had met Bedard, or had any way to determine his race, until after he submitted his second resume and appeared for an in-person interview. *Id.* Second, there is no evidence that anyone from Marriott instructed Bedard to falsify his resume. *Id.* As Bedard testified at his deposition, he posted his generic resume to a job search website called brassring.com. *Id.* at 21-22. Subsequent to posting his resume, he was contacted by a recruiter from Marriott, who told him about the Production Support Manager position and described the job responsibilities. *Id.* Bedard used the information he learned about the position to tailor his resume to include his experience that was relevant to the position. *Id.* It certainly is not uncommon for job applicants to tailor their resumes to specific positions. In fact, even Brown admitted that he keeps different versions of his own resume. *Id.*

Brown's attack of Gaetan Bedard's technical skills highlights that Brown does not understand the nature of the position for which he was applying. Marriott was not looking for a programmer, it was looking for a manager. *Id.* at 19. Brown criticizes Bedard for having "only basic understanding" of COBOL and SQL, but fails to establish that anything beyond a basic understanding is needed for the position. *Id.* The Assignment Statement that Fried prepared listed COBOL as a required technical skill. *Id.* In her deposition, Fried explained that required technical skill means that the applicant has

experience with or exposure to the particular skill. *Id.* The position does not require the person to be an expert in COBOL programming or to have anything more than a basic understanding of COBOL. *Id.*

Brown's assertion that Marriott bifurcated the position and posted an ad for another position to supplement the technical shortcoming of Bedard is without merit and unsupported by the record. This new posting was for the new position of "COBOL Production Support Programmer Analyst." *Id.* at 23. This posting was not for Ms. Fried or even for her department.[4] *Id.* As Ms. Fried explained, the "COBOL Production Support Programmer Analyst" was not even a position within her department. *Id.*

Brown makes reference to Bedard's responses regarding a series of questions his counsel claims are related to COBOL to establish that Bedard does not have a sufficient understanding of COBOL. *Id.* at 19. There were multiple questions that Bedard could not answer because of how they were phrased. *Id.* at 19-20. Brown's counsel was unable to test Bedard's technical knowledge and skill as he could not form proper questions. *Id.*

Furthermore, Brown failed to designate any experts to testify what would establish a basic or expert understanding of COBOL. *Id.* Therefore, there was no evidence to establish what level of skill Bedard or Brown have with COBOL or any other programming language. *Id.* Such evidence is not relevant to this case as Fried testified that she was not looking for a programmer. *Id.*

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[4] Fried testified that the position probably was for the finance area or payroll. *Id.*

Two managers (Manager, Information Resources and the Production Support Manager) directly report to Judith Fried. *Id.* at 5. Christopher Foster was promoted to the position of Manager, Information Resources by Fried on November 6, 2004. *Id.* Foster is African-American. *Id.* He was originally hired as a Senior Systems Analyst on June 1, 2002. *Id.* Foster was promoted to a manager position, at the same level as the position for which Brown applied, by the same hiring manager Brown claims discriminated against him based upon his race. *Id.* at 17.

REASONS FOR DENYING THE PETITION

The *McDonnell Douglas* burden shifting analysis was properly applied by the District Court and its decision was reviewed and affirmed by the Fourth Circuit. 411 U.S. 792; Pet. App. at 1, 6. Brown cannot establish that the District Court or the Fourth Circuit failed to apply the burden shifting analysis from *McDonnell Douglas. Id.*

Brown has failed to advance any basis for this Court to grant his petition for a writ of certiorari. Sup. Ct. R. 10. The Court of Appeals entered a decision that is consistent with decisions of this Court and of other circuits. Pet. App. at 1. The Court of Appeals applied the burden shifting analysis as set forth by this Honorable Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and as applied in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 234-35 (4th Cir. 1991), and *Evans v. Technologies Applications & Serv., Co.*, 80 F.3d 954, 960 (4th Cir. 1996). *Id.* Brown's asserts in his

Petition that the Court of Appeals misapplied a properly stated rule of law, for which a petition for a writ of certiorari is rarely granted. Sup. Ct. R. 10.

I. The Fourth Circuit Upheld the District Court's Proper Application of the *McDonnell Douglas* Burden Shifting Analysis

There is no conflict among the Federal Circuits in their analysis of pretext in disparate treatment claims based on Title VII and Section 1981. The Fourth Circuit properly applied the *McDonnell Douglas* burden shifting analysis to Brown's claim. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); Pet. App. at 1. It did not rule in the present case that bald statements that one applicant was better than another is sufficient. *Id.* Marriott's legitimate, nondiscriminatory reasons for not hiring Brown as set forth in the record were consistent with internal discussions. *Id.*, Pet. App. at 6. The Fourth Circuit reviewed the decision of the District Court and determined that it "properly determined that, even assuming that Brown established a *prima facie* case of discrimination, he failed to establish pretext for Marriott's legitimate, nondiscriminatory reasons for failing to hire Brown for the position at issue." *Id.* The Fourth Circuit noted that the record evidence showed that Marriott chose not to select Brown because of his poor verbal and written communication skills. *Id.* As the court found, Marriott had several reasons for not hiring Brown. *Id.* The fact that it communicated the most palpable reasons to him does not establish pretext. *Id.*

The District Court, as the Fourth Circuit found, applied the proper *McDonnell Douglas* burden shifting analysis. *Id.*; Pet. App. at 6. Using the appropriate test, the District Court found that Brown established a *prima facie* case of employment discrimination. Pet. App. at 6 (citing *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007)). After determining that Brown established a *prima facie* case, the District Court properly noted that the burden then shifted to Marriott to "articulate a legitimate, nondiscriminatory reason" for not hiring Brown. Pet. App. at 6 (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004)).

The District Court found that Marriott offered two legitimate, nondiscriminatory reasons for not hiring Brown: (1) that Brown's management experience was limited and that Brown did not understand the requirements of a COBOL Production Support Manager; and (2) that Brown did not demonstrate good communication skills. Pet. App. at 6. The District Court found support in the record for these assertions. *Id.* For instance, the grammatical and spelling errors in Brown's email to Marriott regarding the position support Marriott's position that Brown did not possess the communication skills necessary for the position. *Id.* The District Court therefore concluded that Marriott had advanced a legitimate, nondiscriminatory reason for not hiring Brown and thus sustained its burden. *Id.*

Next, the District Court considered whether Marriott's proffered reasons were mere pretext. *Id.* (citing *Hill*, 354 F.3d at 284). As the District Court

noted in its decision, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." Pet. App. at 6 (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). The District Court found that the facts of the case support that Brown's limited managerial experience and poor communication skills were the reasons Marriott did not hire Brown. *Id.*

The District Court specifically addressed Brown's argument that the proffered reasons were pretext because Marriott gave different reasons for not hiring Brown on more than one occasion. *Id.* The District Court found that the reasons for not hiring given by Marriott to Brown were consistent with internal discussions and the notes taken during the interview of Brown. *Id.*

In reviewing the decision of the District Court, the Fourth Circuit found that it properly determined that Brown failed to show that Marriott's proffered reasons for not hiring Brown were pretext. Pet. App. at 1. It therefore properly upheld the District Court's decision finding no discrimination.

II. The District Court, As Affirmed by the Fourth Circuit, Applied the Same Showing of Pretext as Required in *Burdine*

Under *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a defendant, after the plaintiff proves a *prima facie* case of discrimination, bears only the burden "to articulate some legitimate, nondiscriminatory reasons for the

employee's rejection." *Id.* at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant meets this burden, then the plaintiff must prove by a preponderance of the evidence that the reasons offered by the defendant were pretext. *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 804). As the Court noted in *Burdine*, the defendant does not need to prove that its hiring decision was actually motivated by the proffered reasons. *Id.* at 254. The Court rejected the Court of Appeals requirement that the defendant prove more than explaining its reasons for not hiring the plaintiff. *Id.* 256-57. The Court also held that the Court of Appeals erred in requiring the defendant to prove that the person hired was more qualified than the plaintiff. *Id.* at 258. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* at 259.

The District Court, as affirmed by the Fourth Circuit, concluded that Brown established a *prima facie* case of discrimination. Pet. App. at 1, 6. Both courts properly determined that Marriott proffered legitimate, nondiscriminatory reasons for not hiring Brown. *Id.* The courts properly recognized that the burden then shifted back to Brown to show that the proffered reasons were mere pretext. *Id.* The courts properly held that Brown failed to meet this burden. *Id.*

III. The Fourth Circuit Properly Considered and Rejected Brown's Claim that the Proffered Legitimate, Non-discriminatory Reasons Were Pretext

In *Patterson v. McLeon Credit Union*, 491 U.S. 164, 188 (1989), this Court held that it was error for a trial court to instruct the jury that plaintiff could carry her burden of persuasion as to pretext only by showing that she was better qualified than the white applicant who was hired. In *Burdine,* this Court held that a defendant is not required to prove that the person hired was more qualified than the plaintiff. *Burdine*, 450 U.S. at 258.

The Fourth Circuit properly upheld the District Court's determination that Marriott's proffered legitimate, nondiscriminatory reasons for not hiring Brown, *e.g.* that his managerial experience was limited and his communication skills were poor, were in fact the reasons he was not hired. Pet. App. at 1. The Fourth Circuit determined that Brown failed to establish pretext and thus affirmed the District Court's order granting Marriott's Motion for Summary Judgment. *Id.* Despite Brown's unsupported assertion that he was better qualified for the position than the applicant who was hired, Marriott is not required to prove that the person it ultimately hired for the position was more qualified than the plaintiff. *Burdine*, 450 U.S. at 258.

Brown had the burden to show that Marriott's proffered nondiscriminatory reasons for not hiring him were pretext and that race was the real reason he was not hired. *Hill*, 354 F.3d at 294 (4th Cir. 2004). The District Court, as affirmed by the Fourth Circuit, found that Marriott's proffered nondiscriminatory reasons were supported by the record and were in fact the reasons why Brown was not hired. *Id.*; Pet. App. at 6. The Fourth Circuit found that there was no evidence that Marriott's

decision not to select Brown was motivated by any desire other than to select the candidate that they felt was the best suited for the position. Pet. App. at 1.

Brown's assertion that the Fourth Circuit and the District Court ignored "evidence" of pretext is without merit. Brown's claim of pretext is unsupported by the record in this case. The Fourth Circuit and the District Court properly found that Brown failed to establish pretext by a preponderance of the evidence. *Id.*; Pet. App. at 6. The Fourth Circuit, in affirming the District Court, did not impose a greater burden on Brown. Both courts held that Brown failed to meet his burden as to pretext as his claim was unsupported by the record. *Id.* As this Court held in *Burdine*,

> The plaintiff retains the burden of persuasion. [He] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. [He] may success in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-805).

The Fourth Circuit has consistently applied this analysis, as it did in affirming the District Court's decision in this case. There is no split in the circuits as Brown claims. The District Court, as affirmed by the Fourth Circuit, properly applied the rule of law to the facts of this case in granting Marriott's Motion for Summary Judgment.

CONCLUSION

The Fourth Circuit properly affirmed the District Court's grant of summary judgment in favor of Marriott International, Inc. Petitioner has failed to present any compelling reasons for his petition for a writ of certiorari to be granted. For these reasons, Respondent Marriott International, Inc. respectfully requests that this Honorable Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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